STATE OF RHODE ISLAND

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: May 19, 2023)

SEAP PHIN	:	
	:	
v.	:	**C.A. No. PM-2021-4071**
	:	
STATE OF RHODE ISLAND	:	

DECISION

PROCACCINI, J. Before this Court is Petitioner Seap Phin's (Petitioner) Application for Post-Conviction Relief (Application) in which he argues that he received ineffective assistance of counsel when he pleaded nolo contendere in 2000 to charges of felony assault and conspiracy. Specifically, Petitioner, a lawful permanent resident, maintains that his attorney failed to advise him of the possible immigration consequences of such a plea. Jurisdiction is pursuant to G.L. 1956 § 10-9.1-1.

I

Facts and Travel

In the late-1970s, Petitioner's family fled the Khmer Rouge genocide in Cambodia and settled in a refugee camp in Thailand. (Appl. ¶¶ 7, 11; Mem. of Law in Supp. of Pet'r's Appl. for Post-Conviction Relief (Pet'r's Mem.) 15.) Born in that Thai refugee camp in 1979 and never having set foot in Cambodia, Petitioner is nevertheless a Cambodian citizen. (Appl. ¶¶ 7, 11; Pet'r's Mem. 15.) At two-years-old, the United States granted Petitioner and his family asylum, and at five-years-old, Petitioner became a legal permanent resident. (Appl. ¶ 7; *id.* Ex. B (Permanent Resident Card).) To this day, Petitioner has never visited Cambodia, and he has no

remaining family in Cambodia. (Pet'r's Mem. 15; Pet'r's Mem. in Lieu of Closing Statement in Supp. of his Appl. for Post-Conviction Relief (Pet'r's Closing Mem.) 8.)

On March 20, 1999, a fight broke out in the West End of Providence between rival street gangs—the Providence Street Boys and the Oriental Rascals. (Pet'r's Mem. 2; Appl. Ex. A (Plea Colloquy) 4-5.) A young man, Savann Maong, died in the altercation. (Plea Colloquy 5.) Petitioner, then nineteen-years-old, was identified as having hit a second young man, Christopher Coletta, with a pipe, causing severe injury. *Id.* Mr. Coletta suffered a collapsed lung, internal bleeding, and a brain injury with partial paralysis and spent months in hospitals and rehabilitation facilities relearning how to walk, talk, spell, and read. *Id.* at 9-11. The State charged Petitioner with first degree murder and conspiracy. (Docket, P1-1999-3118D.)

On June 9, 2000, in advance of any criminal trial, Petitioner entered into a cooperation agreement with the State. *See generally* State's Obj. to Pet'r's Mot. to Conduct Disc. Ex. 1 (Mem. of Agreement). Petitioner agreed to assist in apprehending individuals involved in the March 20, 1999 altercation and to provide future testimony against his codefendants. *Id.* at 1-2. In exchange, the State amended Petitioner's murder charge to the felony assault of Mr. Coletta and agreed "to inform the parole board and immigration officials of the nature and extent of [Petitioner's] cooperation and performance with respect to this memorandum of agreement." *Id.* at 2-3. Thereafter, Petitioner pleaded nolo contendere to felony assault and conspiracy, and the Court sentenced Petitioner to ten years imprisonment, with two to serve less credit for time served since March of 1999. *Id.* at 3; Plea Colloquy 14. The plea request form that Petitioner signed included the following statement: **I UNDERSTAND THAT IF I AM A RESIDENT ALIEN, A SENTENCE IMPOSED AS A RESULT OF MY PLEA MAY RESULT IN**

DEPORTATION PROCEEDINGS OVER WHICH THIS COURT HAS NO CONTROL.

(Hr'g (July 28, 2022) Ex. 4 (Plea Request Form) 1 (emphasis in original).)

During Petitioner's plea colloquy, the following exchange occurred:

> "THE COURT: Mr. Phin, do you speak English?
>
> "[PETITIONER]: Yes, sir.
>
> "THE COURT: And you understand the consequences of changing your plea?
>
> "[PETITIONER]: Yes, sir.
>
> "THE COURT: Are you a United States citizen?
>
> "[PETITIONER]: No, sir.
>
> "THE COURT: Do you know there may be consequences from your plea with the Immigration and Naturalization Service?
>
> "[PETITIONER]: Yes, sir.
>
> "THE COURT: What's your country of origin?
>
> "[PETITIONER]: Thailand.
>
> "THE COURT: And you're—notwithstanding that, and I'm sure, knowing Mr. Mann, he explained that to you?
>
> "[PETITIONER]: Yes, sir.
>
> "THE COURT: You're willing to change your plea to nolo in this case?
>
> "[PETITIONER]: Yes.
>
> "THE COURT: The answer is yes?
>
> "[PETITIONER]: Yes.
>
> "THE COURT: And you know that you give up other rights or you could be giving up that right or any rights you have under immigration, which you're going to give up the rights in this court; you understand that?

"[PETITIONER]: Yes." (Plea Colloquy 2-3.)

Petitioner completed the remainder of his sentence and, immediately upon being released, he was detained by federal immigration authorities. (Tr. 69:21-70:2 (July 28, 2022).) According to Petitioner, on April 3, 2001, immigration officials ordered he be deported to Cambodia. (Appl. ¶¶ 2, 18; Tr. 45:1-12 (July 28, 2022).)[1] Nevertheless, Petitioner states that federal authorities have not yet acted on that order, and Petitioner remains in the United States today. (Pet'r's Mem. 2.)[2]

On June 18, 2021—over twenty years after Petitioner's plea, incarceration, and subsequent deportation notice—Petitioner filed the instant Application. *See generally* Appl. He argues that he received ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution and article I, section 10 of the Rhode Island Constitution. (Pet'r's Mem. 1.) According to Petitioner, he was transported to court on the morning of June 9, 2000 for what he believed to be a bail hearing. (Tr. 25:12-16, 26:24-27:2 (July 28, 2022).) Instead, allegedly without prior notice or discussion with his attorney, Petitioner was presented with the

[1] An applicant for postconviction relief has the burden of proving an entitlement to such relief. *Burke v. State*, 925 A.2d 890, 893 (R.I. 2007). Although Petitioner does not provide evidence of his deportability or removal status, the Court notes that "[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable." *See* 8 U.S.C. § 1227(a)(2)(A)(iii); *see also id.* § 1101(a)(43)(F) ("aggravated felony" includes crimes of violence for which the term of imprisonment is at least one year). It should go without saying, however, that an applicant who has not demonstrated an adverse immigration consequence cannot prevail on an ineffective assistance claim predicated on such a consequence.

[2] Regardless of an individual's deportation status, the United States did not have a repatriation agreement with Cambodia to facilitate removal until 2002. *See* Letter from Sen. Edward Markey et al. to Sec. of Homeland Security, 2 (Apr. 13, 2021), https://www.markey.senate.gov/imo/media/doc/southeast_asian_deportation_letter.pdf (referencing 2002 agreement); Denise Couture & Ashley Westerman, *U.S. Deports Dozens More Cambodian Immigrants, Some For Decades-Old Crimes*, NPR (Dec. 18, 2018, 4:46 PM ET), https://www.npr.org/2018/12/18/677358543/u-s-deports-dozens-more-cambodian-immigrants-some-for-decades-old-crimes (explaining history of Cambodian repatriation).

State's offer of a plea agreement. *Id.* at 32:17-35:22. Believing the offer to be time-limited and recognizing the benefit of a significantly lesser sentence compared to what could be imposed after a trial, Petitioner agreed to the State's offer and entered his plea that same day. *Id.* at 77:16-79:6. Petitioner maintains that his attorney offered no legal advice as to the consequences of the plea except for advising Petitioner—after the plea had already been entered—to consult an immigration attorney. *Id.* at 36:5-7.

In consideration of Petitioner's Application, this Court held evidentiary hearings on July 28 and 29, 2022, during which the Court heard testimony from Petitioner and his trial counsel. *See generally* Tr. (July 28 & 29, 2022). The Court then heard further testimony on September 22, 2022 from Sergeant William Dwyer, an investigator for the Attorney General's office, regarding his present efforts to locate witnesses to the March 20, 1999 altercation and relating to the State's defense of laches. *See generally* Tr. (Sept. 22, 2022).

Petitioner and the State then submitted closing arguments via post-hearing memoranda. *See generally* State's Post-Hearing Mem. of Law Obj. to Pet'r's Appl. for Post-Conviction Relief (State's Closing Mem.); Pet'r's Closing Mem. With his closing memorandum, Petitioner has added a new dimension to his claim—he now asserts a combination of errors involving the claimed lack of immigration advice *and* trial counsel's failure to investigate allegedly "apparent" weaknesses in the State's case against Petitioner. (Pet'r's Closing Mem. 2, 8-10.) Petitioner therefore concludes that he was prejudiced by accepting a plea offer in the absence of adequate advice that would have allowed him to recognize that the plea was not a "good deal." *Id.* at 8 ("The allure of this deal lies in the assumption that the State had a strong enough case to potentially convict Mr. Phin of murder."). Petitioner asks this Court to set aside his plea and vacate his conviction. (Pet'r's Mem. 2, 16.)

II

Standard of Review

Postconviction relief is a statutory remedy available to "[a]ny person who has been convicted of, or sentenced for, a crime . . . who claims . . . [t]hat the conviction or the sentence was in violation of the constitution of the United States or the constitution or laws of this state[.]" Section 10-9.1-1(a). The petitioner "bears the burden of proving, by a preponderance of the evidence, that he is entitled to postconviction relief." *Burke v. State*, 925 A.2d 890, 893 (R.I. 2007) (citing *Larngar v. Wall*, 918 A.2d 850, 855 (R.I. 2007)).

"The law in Rhode Island is well settled that this Court will pattern its evaluations of the ineffective assistance of counsel claims under the requirements of *Strickland v. Washington*, 466 U.S. 668 (1984)." *Brennan v. Vose*, 764 A.2d 168, 171 (R.I. 2001). "Under that exacting standard, applicants must demonstrate both that 'counsel's performance was deficient in that it fell below an objective standard of reasonableness' and that 'such deficient performance was so prejudicial to the defense and the errors were so serious as to amount to a deprivation of the applicant's right to a fair trial.'" *Perkins v. State*, 78 A.3d 764, 767 (R.I. 2013) (quoting *Hazard v. State*, 64 A.3d 749, 756 (R.I. 2013)).

III

Analysis

A

Performance

The first prong of the *Strickland* analysis—the performance prong—requires an applicant to demonstrate that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Neufville v. State*, 13 A.3d 607,

610 (R.I. 2011)). To overcome the "strong presumption" of competent representation, a petitioner must show that "counsel's advice was not within the range of competence demanded of attorneys in criminal cases[.]" *Id.*

In *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), the United States Supreme Court held that the Sixth Amendment requires criminal defense counsel to inform a defendant whether a plea carries a risk of deportation. *See Padilla*, 130 S. Ct. at 1486. When the relevant immigration law is "succinct and straightforward," counsel has a duty to give correct advice regarding anticipated immigration consequences of a plea. *Id.* at 1483. Conversely, when the law is complex and immigration consequences are "unclear or uncertain," counsel satisfies his duty by advising his client of the *possibility* of adverse immigration consequences. *Id.*

Padilla, however, was announced in 2010—ten years after Petitioner's 2000 plea—and "does not have retroactive effect." *Chaidez v. United States*, 568 U.S. 342, 344 (2013) (applying retroactivity principles set out in *Teague v. Lane*, 489 U.S. 288 (1989)). Recently, in *Desamours v. State*, 210 A.3d 1177 (R.I. 2019), the Rhode Island Supreme Court declined to address an ineffective assistance claim relating to a 1999 plea because it determined that "the Supreme Court's ruling in *Padilla* does not retroactively apply to convictions that were 'final' when *Padilla* was decided." *Desamours*, 210 A.3d at 1181 n.5.[3]

Notwithstanding *Desamours*, Petitioner asserts that his attorney's alleged failure still violated the performance prong of *Strickland* because (1) this Court is not obligated to follow *Chaidez* and (2) his attorney's advice was not "reasonable[ ] under prevailing professional

[3] In *Brito-Batista v. State*, No. PM 2004-3770, 2008 WL 4176775 (R.I. Super. Aug. 21, 2008), this Court held that "prevailing norms of practice" existing in 1997 "instructed defense attorneys to consider and discuss with their clients the possible immigration consequences of a plea." *Brito-Batista*, 2008 WL 4176775. Nevertheless, *Desamours* postdated *Brito-Batista* and is binding on this Court.

norms." *Strickland*, 466 U.S. at 688. In support, he points to an American Bar Association (ABA) standard, published in 1999, instructing defense attorneys to "'determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea.'" *See* Pet'r's Closing Mem. 7 (quoting ABA Standard 14-3.2(f) (1999)); *see also Brito-Batista v. State*, No. PM 2004-3770, 2008 WL 4176775 (R.I. Super. Aug. 21, 2008) (identifying professional norms as of 1997 requiring immigration advice by criminal defense counsel).

Petitioner therefore urges this Court to follow *Commonwealth v. Sylvain*, 995 N.E.2d 760 (Mass. 2013), in which the Massachusetts Supreme Judicial Court relied on its "independent review" to hold "that the Sixth Amendment right enunciated in *Padilla* was not a 'new' rule" and therefore would be applied retroactively in Massachusetts. *See* Pet'r's Closing Mem. 11; *see also Sylvain*, 995 N.E.2d at 762, 770. In breaking from *Chaidez*, the *Sylvain* Court cited *Danforth v. Minnesota*, 552 U.S. 264 (2008), which clarified that the *Teague* retroactivity principles "do[ ] not [in any way] 'limit the authority of a state court, when reviewing its own state criminal convictions, to provide a remedy for a violation that is deemed "nonretroactive" under *Teague*.'" *Sylvain*, 995 N.E.2d at 770 (quoting *Danforth*, 552 U.S. at 282). The Massachusetts high court therefore reaffirmed its prior ruling that "defendants whose State law convictions were final after April 1, 1997, may attack their convictions collaterally on *Padilla* grounds."[4] *Id.* at 762 (citing *Commonwealth v. Clarke*, 949 N.E.2d 892, 904 (Mass. 2011)).

[4] April 1, 1997 was the effective date of the federal Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546—"the point at which deportation became 'intimately related to the criminal process' and 'nearly an automatic result for a broad class of noncitizen offenders.'" *Commonwealth v. Clarke*, 949 N.E.2d 892, 904 (Mass. 2011) (quoting *Padilla v. Kentucky*, 130 S. Ct. 1473, 1481 (2010)).

Regardless of the brevity of our Supreme Court's treatment in *Desamours* and the alternate tack of the Massachusetts Supreme Judicial Court, this Court is bound to follow the *Desamours* opinion's explicit controlling instruction that *Padilla* is not to be applied retroactively. *See Desamours*, 210 A.3d at 1181 n.5; *see also Thayorath v. State*, No. P2/96-2165 AG, 2021 WL 387943, at *3 (R.I. Super. Jan. 27, 2021).

Even if this Court were not so bound, however, Petitioner has failed to demonstrate that his trial counsel's performance was deficient. Petitioner's claim that counsel failed to discuss immigration consequences is belied by (1) Petitioner's affirmative representation to the contrary in his plea colloquy (Plea Colloquy 2-3); (2) the immigration clause of his cooperation agreement with the State (Mem. of Agreement 3); (3) the immigration disclosure in his plea request form (Plea Request Form 1); and (4) his attorney's credible explanation of a standard criminal defense practice that included advance discussion of immigration concerns and consequences, as well as a detailed individual review of any proposed plea agreement. (Tr. 113:22-119:25 (July 28, 2022).)

Petitioner's further contention that defense counsel failed "to conduct any investigation" is pure conjecture, feebly extrapolated from (1) a notation that counsel did not attend a particular tangible evidence viewing and (2) the absence in the trial record of a motion for funds to hire an investigator. (Pet'r's Closing Mem. 8.) Trial counsel testified, however, that his standard practice was to undertake certain investigatory activities himself—specifically, speaking with his client, the prosecution, and possibly the detectives, in addition to other steps as appropriate to the circumstances. (Tr. 140:17-144:5 (July 29, 2022).) He also testified that he typically conducted his investigatory efforts mindful of and sensitive to their potential adverse impact on any ongoing negotiations with the prosecution. *Id.* at 123:5-124:15, 143:8-19. Although trial

counsel could not recall Petitioner's case with any specificity, he speculated from the context that his focus was likely on proceeding with favorable negotiations. *Id.* at 123:5-124:15, 143:8-19. Trial counsel further testified that he had no recollection of any credible dispute as to whether an admitted "aluminum pipe"—the alleged unviewed tangible evidence—would be considered a dangerous weapon. *Id.* at 159:21-25. As another justice of this Court has observed, ABA standards recognize that "'an 'appropriate' investigation may be quite limited in certain cases—for example, where a highly favorable pre-indictment plea is offered, and the pleas offered after indictment are likely to carry significantly more severe sentences.'" *Briggs v. State*, No. P1/15-1144BG, 2020 WL 1242692, at *7 (R.I. Super. Mar. 10, 2020) (quoting ABA, *Criminal Justice Pleas of Guilty Standards, Commentary* §14-3.2(b), p. 123). Especially when confronted with a conspiracy charge involving multiple codefendants, a defendant's failure to take early advantage of an offer of cooperation could be particularly detrimental. *Cf. id.* In such circumstances, "mere tactical decisions, though ill-advised, do not by themselves constitute ineffective assistance of counsel." *Toole v. State*, 748 A.2d 806, 809 (R.I. 2000).

Further, nowhere in his Application did Petitioner allege a failure to investigate. *See generally* Appl. Consequently, the trial record is not before this Court, and it is therefore impossible to assess Petitioner's claims of "the absence of a single credible witness . . . [and] no physical evidence connecting Mr. Phin to the fighting." (Pet'r's Closing Mem. 9.) Finally, trial counsel testified that he did not recall the specific investigation he conducted more than twenty years ago. (Tr. 140:12-145:17, 156:9-165:3.) Contrary to Petitioner's suggestion that trial counsel had to demonstrate adequate investigation before this Court, counsel had no such burden and is afforded the "strong evidentiary presumption" of competent conduct. *Larngar*, 918 A.2d

at 856. Petitioner cannot satisfy his burden of proof based solely upon his defense counsel's understandable lack of recollection of events occurring more than twenty years ago.

Therefore, the Court is unpersuaded by Petitioner's colorful conclusion that "[t]he failure to investigate was the gasoline and the inadequate and incorrect immigration advice was the match; together, they ignited an incidence [of] ineffective assistance[.]" (Pet'r's Closing Mem. 2 n.1.) A more apt analogy for this case can be drawn from arithmetic: "Zero plus zero still equals zero[.]" *Cuesta-Rojas v. Garland*, 991 F.3d 266, 277 (1st Cir. 2021). Absent contemporaneous evidence of a lack of immigration advice and/or inadequate investigation, Petitioner's ineffective assistance claim fails.

B

Prejudice

The *Strickland* test's second prong—the prejudice prong—"is satisfied by a showing of prejudice resulting from counsel's deficient performance." *Perkins*, 78 A.3d at 768. In ineffective assistance claims, "prejudice" means "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Hazard*, 64 A.3d at 757 (internal quotation omitted). In the specific context of a guilty or nolo plea, an applicant demonstrates prejudice by showing that he "'would not have pleaded . . . and would have insisted on going to trial[.]'" *Neufville*, 13 A.3d at 611 (quoting *State v. Figueroa*, 639 A.2d 495, 500 (R.I. 1994)).

In *Figueroa*, a case decided in 1994, our Supreme Court also required a showing that "the outcome of [the trial] would have been different[.]" *Figueroa*, 639 A.2d at 500; *see also Navarro v. State*, 187 A.3d 317, 326, 328 (R.I. 2018) (reiterating this requirement without further analysis because the applicant failed to satisfy the performance prong). The *Figueroa*

applicant's trial counsel agreed that he had provided inaccurate advice about the probable immigration consequences of a nolo plea. *Id.* Nevertheless, our Supreme Court held that the applicant had failed to satisfy the prejudice prong of *Strickland*, observing that the applicant's briefing was "devoid of any argument or references to evidence tending to show his innocence of the underlying weapons charge." *Id.* The Court upheld the applicant's conviction because "it is most probable that a trial would have resulted in a conviction[.]" *Id.* at 501.

Twenty-three years later, the United States Supreme Court took up a similar case in *Lee v. United States*, 137 S. Ct. 1958 (2017). Like *Figueroa*, the first *Strickland* prong was not disputed. *Lee*, 137 S. Ct. at 1964. Unlike *Figueroa*, however, the Court modified the prejudice prong of *Strickland* to "instead consider whether the defendant was prejudiced by the 'denial of the entire judicial proceeding . . . to which he had a right.'" *Id.* at 1965.[5] Therefore, "when a defendant claims that his counsel's deficient performance deprived him of a trial by causing him to accept a plea, the defendant can show prejudice by demonstrating a 'reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" *Id.* (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)). "Rather than asking how a hypothetical trial would have played out absent the error, the Court considered whether there was an adequate showing that the defendant, properly advised, would have opted to go to trial." *Id.* The Court reasoned that:

> "When a defendant alleges his counsel's deficient performance led him to accept a guilty plea rather than go to trial, we do not ask

[5] The U.S. Supreme Court therefore announced a context-specific rule for "how the required prejudice may be shown," *Lee v. United States*, 137 S. Ct. 1958, 1965 n.1 (2017), resolving a circuit split. *See* Thea Johnson, *Fictional Pleas*, 94 IND. L.J. 855, 886 n.166 (2019) (observing that the Second, Fourth, Fifth, and Sixth Circuits had held that "strong evidence of guilt precluded a finding of prejudice under an ineffective assistance of counsel analysis[,]" while the Third, Ninth, and Eleventh Circuits had found prejudice, "even in the face of poor trial prospects.").

> whether, had he gone to trial, the result of that trial 'would have been different' than the result of the plea bargain. That is because, while we ordinarily 'apply a strong presumption of reliability to judicial proceedings,' 'we cannot accord' any such presumption 'to judicial proceedings that never took place.'" *Id.* at 1965 (quoting *Roe v. Flores-Ortega*, 528 U.S. 470, 482-83 (2000)).

In applying this prejudice standard, a reviewing court must make "a 'case-by-case examination' of the 'totality of the evidence[,]' . . . focus[ing] on a defendant's decisionmaking[.]" *Id.* at 1966 (citing *Williams v. Taylor*, 529 U.S. 362, 391 (2000)). Courts will rarely be confronted with the "unusual circumstances" of *Lee*—which involved the defendant stating on the record at his plea colloquy that immigration considerations were important to him and that he did not understand the judge's immigration warnings, followed by defense counsel dismissing the warnings as "standard" and inapplicable to the defendant. *Id.* at 1967. Instead, "[o]ften, . . . little or no direct evidence relating to prejudice is available, and the best we can hope to have is *circumstantial evidence* tending to show how a reasonable person in the decisionmaker's position would act." Justin Murray, *Prejudice-Based Rights in Criminal Procedure*, 168 U. PA. L. REV. 277, 308 (2020) (emphasis in original). Such evidence includes the non-exclusive list of considerations identified in *Lee*:

> "(1) [H]ow likely the defendant would be to prevail at trial; (2) the defendant's relative connections to the United States and to his country of citizenship; (3) the relative consequences of the defendant's guilty plea compared to a guilty verdict at trial; and most importantly, (4) any evidence of how important immigration consequences were to the defendant at the time he pleaded guilty." *United States v. Rodriguez*, 49 F.4th 1205, 1214 (9th Cir. 2022).[6]

[6] More broadly, factors impacting defendant decision-making may include "individual risk tolerance, psychological biases, time pressures, and the sequence of information received[,]" as well as "time spent in the United States, language access and comprehension of the proceedings, prospects in immigration court and the possibility of relief from removal, access to an immigration attorney, the trauma of the immigrant experience and fear of return to their home country." Thea Johnson & Emily Arvizu, *Proving Prejudice After* Lee v. United States:

Ultimately, the prejudice inquiry "focuse[s] on the particular circumstances of an individual defendant, supported by contemporaneous evidence, demonstrating that it would have been rational for that individual defendant to reject the plea in favor of going to trial." Thea Johnson & Emily Arvizu, *Proving Prejudice After* Lee v. United States: *Ineffective Assistance of Counsel in the Crimmigration Context*, 25 HARV. LATIN AM. L. REV. 11, 26 (2022) (citing *Bobadilla v. State*, 117 N.E.3d 1272, 1286 (Ind. 2019)); *see also Commonwealth v. Scott*, 5 N.E.3d 530, 548 (Mass. 2014) ("Ultimately, a defendant's decision to tender a guilty plea is a unique, individualized decision, and the relevant factors and their relative weight will differ from one case to the next.").

Although "[a] defendant's failure to satisfy one prong of the *Strickland* analysis obviates the need for a court to consider the remaining prong[,]" *Knight v. Spencer*, 447 F.3d 6, 15 (1st Cir. 2006), even if Petitioner had established deficient performance by trial counsel, an assessment of the *Lee* factors does not support the conclusion that Petitioner would have opted for trial had he been properly advised of his risk of deportation. *Cf. Lee*, 137 S. Ct. at 1965. Most tellingly, a guilty verdict on the originally charged murder and conspiracy counts would have undoubtedly carried a significantly longer sentence than the two years Petitioner served as a result of his plea; and Petitioner's testimony was clear that, unlike the defendant in *Lee*, he prioritized release from incarceration above all other considerations. *See* Tr. 22:20, 24:9-10, 59:24-60:1, 62:13-16 (July 28, 2022) (repeatedly stating that release from incarceration, via bail or otherwise, was his primary motivation); *id.* at 77:13-78:10 (testifying that the offer of a significantly reduced sentence was Petitioner's prime motivation to plead, and the benefit of the

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Ineffective Assistance of Counsel in the Crimmigration Context, 25 HARV. LATIN AM. L. REV. 11, 64 (2022).

deal was so obvious "you don't even have to explain it"); *id.* at 41:15-16 (stating that he was "looking more at the years" to be served).[7]

While Petitioner undisputedly has no connection to Cambodia, there is otherwise no evidence that immigration consequences were considered at all by Petitioner in 2000, let alone treated as dispositive or even important. Petitioner's testimony reveals that while he is *now* concerned about the immigration consequences of his plea, his overwhelming primary concern *then* was release from incarceration. To prove prejudice, Petitioner must "demonstrate[ ] a 'reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" *Lee*, 137 S. Ct. at 1965. Instead, Petitioner noncommittally argues that "timely advice from counsel *could* have made *some* difference." *Compare* Pet'r's Mem. 14 (emphasis added), *with Brito-Batista*, 2008 WL 4176775 (citing evidence supporting the conclusion that the petitioner "would have insisted on going to trial"). It is particularly telling that at no time in his testimony before this Court did Petitioner claim that a more robust understanding of immigration law would have changed his plea. *See, e.g.*, Tr. 51:1-12 (given an opportunity to summarize his complaint, Petitioner stated only that he was now displeased with his attorney's investigation). Therefore, even crediting Petitioner's argument that "he accepted the deal without even a rudimentary understanding of the possibility of deportation[,]" Pet'r's Closing Mem. 10, he fails to appreciate that this argument lacks its

[7] Further, there is no evidence in the record bearing upon Petitioner's likelihood of success at trial. While Petitioner maintains that trial counsel should have interrogated an allegedly uncredible eyewitness and viewed the pipe used in Mr. Coletta's assault, Petitioner offers no evidence that those additional efforts would have been favorable to Petitioner. *See* Tr. 158:11-160:12 (July 29, 2022); *see also Brown v. State*, 964 A.2d 516, 531 (R.I. 2009) (mere speculation about "the importance and assumed impact" of unprocured evidence does not satisfy the second *Strickland* prong). In fact, Petitioner does not dispute that he was present at the March 20, 1999 altercation, and he acknowledges that he hit Mr. Coletta with an aluminum pipe. *See* Tr. 27:6-12 (July 28, 2022); Plea Colloquy 7:16-21; *see also Rodrigues v. State*, 985 A.2d 311, 317 (R.I. 2009).

necessary corollary—Petitioner must prove *both* a lack of advice relating to immigration consequences *and* that a proper awareness of such consequences would have prompted him to opt for trial. *Lee*, 137 S. Ct. at 1965.

The Court, however, is sensitive to the fact that Petitioner's subjective contemporaneous concern with immigration consequences cannot be viewed in a vacuum. Finding a lack of prejudice based on a defendant's absence of concern for a consequence of which he was completely ignorant would obviate many ineffective assistance claims. "[T]he purpose of the right to counsel is to protect an accused from his own ignorance[.]" *Brito-Batista*, 2008 WL 4176775. This record, however, does not support the conclusion that Petitioner would have opted for trial had he been made aware of the risk of deportation. *See* Murray, *supra*, at 308. As Petitioner explained, there was a "paucity of deportations of Southeast Asians locally and nationally at the time[.]" (Pet'r's Closing Mem. 6.) Even with a U.S. deportation order, a Cambodian national generally would not be subject to actual removal absent a repatriation agreement, which did not exist in 2001, and cooperation with the Cambodian government. *See supra* note 2; U.S. DEP'T OF HOMELAND SEC., OFFICE OF THE INSPECTOR GEN., ICE FACES BARRIERS IN TIMELY REPATRIATION OF DETAINED ALIENS 9 (2019). Faced with the prospect of a lengthy prison sentence as compared to a two-year term that was nearly complete, personally prioritizing release, and not otherwise likely to be removed absent a future change in diplomatic relations, the record supports the conclusion that Petitioner would not have opted for trial. "Courts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences." *Lee*, 137 S. Ct. at 1967.

The Court is sensitive to the dissonant reality that "[p]lea bargains . . . 'take advantage of both prospect theory and temporal discounting' by placing defendants in a situation in which they must weigh their prospects but inevitably discount the future ramifications because the present circumstances are intolerable." Johnson & Arvizu, *supra*, at 40 (quoting Vanessa A. Edkins & Lucian E. Dervan, *Freedom Now or a Future Later: Pitting the Lasting Implications of Collateral Consequences Against Pretrial Detention in Decisions to Plead Guilty*, 24 PSYCHOL., PUB. POL'Y & L. 204, 206 (2018)). Professors Johnson and Arvizu therefore recommend that "courts should trust a defendant's statements that [he] would not have accepted the plea if [he] had known about the potential for deportation, because where a defendant has gotten a terrific deal, a successful [ineffective assistance] claim puts that deal in jeopardy." *Id.* at 61. They reason that "[e]ven if a defendant wins an [ineffective assistance] claim and eventually goes to trial on the matter, they may then face the full force of the mandatory sentence." *Id.* Nevertheless, such a credibility determination is also influenced by an applicant's likely understanding that the State's ability to reprosecute may be adversely impacted by the passage of time as evidence is lost or destroyed, witnesses become unavailable, and memories fade. *See Raso v. Wall*, 884 A.2d 391, 396 n.14 (R.I. 2005); *see also* State's Closing Mem. 6-7 (summarizing Sergeant Dwyer's inability to now locate witnesses to the March 20, 1999 altercation).[8] Here, however, as the Court has already observed, Petitioner has never claimed that he would have rejected the plea offer had he understood the resulting potential for deportation. *Cf. Lee*, 137 S. Ct. at 1967-68.

[8] Considering this Court's conclusion that Petitioner has failed to establish ineffective assistance of counsel, it is unnecessary to address the State's defense of laches.

IV

Conclusion

For the reasons stated above, this Court finds that Petitioner has failed to meet his burden of establishing by a preponderance of the evidence that postconviction relief is warranted. Accordingly, Petitioner's Application is denied.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Phin v. State of Rhode Island**
CASE NO:	**PM-2021-4071**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**May 19, 2023**
JUSTICE/MAGISTRATE:	**Procaccini, J.**
ATTORNEYS:	
For Plaintiff:	**Shannah Kurland, Esq.**
For Defendant:	**Judy Davis, Esq.**